

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

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|--------------------------|---|------------------------------|
| In re: |) | |
| |) | |
| DWIGHT DALE BAIR, |) | Case No. 01-14458-7C |
| |) | |
| Debtor. |) | |
| _____ |) | |
| |) | |
| THE ROXBURY BANK, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Adversary No. 02-5122 |
| |) | |
| DWIGHT DALE BAIR, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

**ORDER GRANTING SUMMARY JUDGMENT TO
THE ROXBURY BANK**

This matter is before the Court on The Roxbury Bank's Motion for Summary Judgment (Doc. No. 29). The Defendant, Dwight Dale Bair, has failed to respond to the Motion for Summary Judgment and the time for filing a response has passed. The Court has reviewed the brief submitted by The Roxbury Bank, as well as the exhibits attached thereto. The Court is now prepared to rule. The Court makes the following findings of fact and conclusions of law according to Federal Rule of Bankruptcy Procedure 7052. The Court has jurisdiction by virtue of 28 U.S.C. § 1334.

The Roxbury Bank (hereinafter "Bank") filed its Motion for Summary Judgment on April 17, 2003. By way of letter from the Court dated April 18, 2003, Dwight Dale Bair (hereinafter "Bair") was given until May 9, 2003, to file any responsive brief. On May 12, 2003, after the deadline for filing a response, Bair

sought a ten day extension of time to file his response (Doc. No. 34). That motion was granted, giving Bair until May 19, 2003 to respond to the Motion for Summary Judgment (Doc. No. 35).

On May 21, 2003, Bair sought a second extension of time, this time seeking an additional seven days to respond, or until May 27, 2003 (Doc. No. 36). In Bair's second motion for extension of time, defense counsel stated that he did not anticipate using all of the requested seven days as the response was nearly complete. Bair's counsel did not submit an Order with this motion, but the motion was *de facto* granted, as no action was taken by the Court until almost a month later, June 20, 2003. On that date, the Court sent a letter to Bair and to his attorney of record concerning Bair's failure to respond to the Motion for Summary Judgment.

In that letter, the Court informed Bair and his attorney that the response had been due May 27, 2003, and that no response had been received. The Court also acknowledged the fact that Bair's attorney, Victor Nelson, was currently barred from practicing before the United States Bankruptcy Court for the District of Kansas based on his actions in an unrelated matter. Because of Mr. Nelson's inability to file the response, the Court allowed Bair an additional twenty days, to and including July 10, 2003, to locate an attorney who could file the response to the Motion for Summary Judgment. Bair has not filed a response, nor has he sought any further extensions to respond to the Motion for Summary Judgment.

Bair has received over ninety days to respond to the Motion for Summary Judgment but has failed to do so. The last deadline for filing the response, which was as a result of the Court's own twenty day extension of time, expired more than two weeks ago. Therefore, the Court will deem the Motion for Summary Judgment uncontested pursuant to D. Kan. Rule 7.4.

Although D. Kan. Rule 7.4 authorizes the Court to grant the Bank's Motion for Summary Judgment as uncontested without any further notice to the parties, the Court has reviewed the brief filed by the Bank in order to make an independent determination that there is a factual and legal basis for granting the relief sought by the Bank – a finding that Bair's debt to the Bank is non-dischargeable pursuant to 11 U.S.C. § 727(a)(2), (3), (4), (5), and (6).¹ D. Kan. Rule 56.1(a), adopted and incorporated in to this Court's local Rules at D. Kan. LBR 1001.1(a), governs this proceeding. That Rule provides that "All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party." Because the opposing party has failed to controvert any of the facts, they are deemed admitted.

The Court finds, based upon the uncontroverted facts contained in the Memorandum in Support of the Motion for Summary Judgment and the law concerning exceptions to discharge under § 727, that there is a sufficient factual and legal basis for granting the relief sought by the Bank and finding that Bair should be denied a discharge pursuant to § 727(a)(2), (3), (4), (5), and (6). Therefore, the Bank's Motion for Summary Judgment will be granted.²

The Roxbury Bank has also sought a default judgment against Bair, through its Motion for Sanctions (Doc. No. 38), for Bair's failure to comply with this Court's order dated April 16 2003,

¹All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

²Counts I, II and III of The Roxbury Bank's Complaint also requested that Debtor's indebtedness to the Bank not be subject to discharge. Because The Roxbury Bank has not pursued those theories in this summary judgment motion, and because the effect of denying debtor's discharge results in a finding that Debtor's indebtedness to the Bank is not discharged, the Court presumes that The Roxbury Bank has abandoned those Counts, and those Counts are thus dismissed.

requiring Bair produce documents. This Court's ruling on the Motion for Summary Judgment renders the Bank's Motion for Sanctions moot.

IT IS, THEREFORE, BY THIS COURT ORDERED that The Roxbury Bank's Motion for Summary Judgment is granted, and Dwight Dale Bair is denied a discharge in Case No. 01-14458-7.

IT IS FURTHER ORDERED that The Roxbury Bank's Motion for Sanctions Pursuant to Rule 37(b) is denied as moot.

IT IS SO ORDERED this _____ day of July, 2003.

Janice Miller Karlin
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned certified that copies of the Order Granting Summary Judgment to The Roxbury Bank was deposited in the United States mail, postage prepaid on this 31st day of July, 2003 to the following:

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The Honorable Janice Miller Karlin
Bankruptcy Judge